importantly, the decision below is fully consistent with the relevant precedents of this Court. It is well settled that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973); *see also Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 465 (1995); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991). *Federal Power Commission* makes clear that the Treaty of Canandaigua provides the Tuscaroras with no rights that would allow them to evade routine application of New York's fishing laws. Accordingly, the petition for a writ of certiorari should be denied.

I. The New York Court of Appeals Did Not Decide Any Federal Question In A Way That Conflicts With The Decisions of This Court.

A. *Federal Power Commission v. Tuscarora Indian Nation* Disposes of Petitioner's Claim.

Not only is there no conflict between the decision below and the precedents of this Court, but as the New York Court of Appeals properly recognized, this Court's decision in *Federal Power Commission* disposes of petitioner's claim. In *Federal Power Commission*, the Tuscarora Indian Nation challenged the taking of a portion of its reservation near the Niagara River for a hydroelectric plant reservoir. 362 U.S. at 100. The Tuscaroras argued, among other things, that the United States had guaranteed them the "free use and enjoyment" of their lands in the Treaty of Canandaigua, and

noted that they were not a party to the sale of the Seneca lands in the Treaty of Big Tree. *See* 362 U.S. at 121 n.18; Brief of Respondent Tuscarora Indian Nation at 4, *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960) (No. 63).

After reviewing the history of the Tuscaroras and their New York lands, this Court concluded that the Tuscaroras retained no rights under the Treaty of Canandaigua:

> By the Treaty of Canandaigua . . . it was recognized that the Senecas alone had possessory rights to the western New York area here involved and, as a result of that treaty, a large tract of western New York lands, including the lands now owned by the Tuscaroras, was secured to the Senecas. . . . And at the Treaty of Big Tree . . . , [Robert] Morris, with the approbation of the United States, purchased the Senecas' rights of occupancy in the lands here in question for the Holland Land Company. Thus, *the lands in question were entirely freed from the effects of all then existing treaties with the Indians*, and the Tuscaroras' title to their present lands derives . . . from the Holland Land Company . . . and has never since been subject to any treaty between the United States and the Tuscaroras.

362 U.S. at 122-23 n.18 (emphasis added).[3]

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3. While petitioner characterizes this language as "dictum," Pet. at 11 n.4, this Court indicated otherwise. *See Federal Power Comm'n*, 362 U.S. at 123 ("we must *hold* . . . that the lands in question are not subject to any treaty between the United States and the Tuscaroras") (emphasis added).

The Court of Appeals properly concluded that under *Federal Power Commission*, petitioner has no treaty right to engage in off-reservation fishing on former Seneca lands. As this Court explained, and the court below recounted, the Tuscaroras inhabited Seneca land as "guests or tenants at will or by sufferance," and the Treaty of Canandaigua provided the Tuscaroras, who were not even mentioned, with no further rights to those lands. Pet. App. at 9a (citing *Federal Power Commission*, 362 U.S. at 121 n.18). The Tuscaroras' rights in the Seneca lands were wholly contingent on the Senecas' continued ownership and thus were terminated in 1797 when the Senecas sold nearly all their land, including the land where petitioner was ticketed, in the Treaty of Big Tree. Pet. App. at 8a.

Petitioner's efforts to distinguish *Federal Power Commission*, *see* Pet. at 11 n.4, are unpersuasive. That the state parkland where petitioner was ticketed was not directly at issue in *Federal Power Commission* is irrelevant because that parkland was also part of the tract that the Senecas sold at Big Tree. That *Federal Power Commission* did not specifically involve fishing rights, *see id.*, is also irrelevant in light of this Court's holding that the Treaty of Big Tree "entirely freed" the former Seneca lands – including the parkland where petitioner was ticketed – from all "effects" of the Treaty of Canandaigua, including the "free use and enjoyment" guarantee on which petitioner relies.

Petitioner's remaining efforts to discredit the decision below also lack merit. He claims that the Tuscaroras' free use and enjoyment of the Seneca lands could not be "extinguished by implication," or through a land sale by the Senecas alone. *See* Pet. at 20-25. But as explained above, *Federal Power Commission* holds precisely the contrary: that

the Treaty of Big Treaty "entirely freed" the subject lands from the effects of all existing Indian treaties. Petitioner also contends that the Senecas' reservation of fishing and hunting rights in the Treaty of Big Tree should also inure to the Tuscaroras' benefit. *See* Pet. at 24 n.7. This issue was not raised or decided below and thus should not be considered by the Court. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519, 532-33 (1992). In any event, those reserved rights were limited to the Senecas alone. *See* Treaty of September 15, 1797, 7 Stat. 601, 602.

B. The Decision Below Does Not Conflict With Any Decisions of This Court.

While petitioner claims that the New York Court of Appeals failed to follow relevant decisions of this Court, no such conflict exists. Petitioner first claims that the court below departed from this Court's decision in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), and the other cases regarding the distinction between usufructuary and possessory rights held by Indian tribes. Pet. at 15. The fishing rights at issue in *Mille Lacs* were independent of land ownership because the Indians expressly retained them from a tribal land cession, and the rights were therefore not "tied to a reservation." *See Mille Lacs*, 526 U.S. at 177, 201-02.[4] Here, in contrast,

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4. Several of the other cases relied upon by petitioner, *see* Pet. at 15-16, also involved the express retention of fishing rights. *See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 662, 667-68 (1979), and *United States v. Winans*, 198 U.S. 371, 378 (1905). As for *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968), *see* Pet. at 20-21, that case is distinguishable because this Court found that treaty hunting and fishing rights survived a termination act (rather than a later treaty) on the ground that a contemporaneous congressional enactment reflected an intent to preserve them. *See* 391 U.S. at 110-11.

petitioner claims a fishing right that is not independent of land ownership but instead is tied to a reservation: he asserts that the fishing right is a component of the "free use and enjoyment" of the Seneca reservation described in the Treaty of Canandaigua. *Cf. United States v. Dion*, 476 U.S. 734, 738 (1986) (treaty reservation of lands to Indians includes the exclusive right to hunt and fish on the reserved lands).

Unlike the rights in *Mille Lacs*, fishing rights that are tied to a reservation can be terminated by a sale of the reservation that does not mention them. In *Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 766-68 (1985), the Court held that the Klamath Tribe's unequivocal conveyance of all its claim, right, title, and interest in and to a portion of the Tribe's reservation ceded its hunting and fishing rights in that portion, even though these rights were not mentioned, because they did not exist independently of the reservation. And, as discussed above, this Court held in *Federal Power Commission* that the Senecas' sale of their lands in the Treaty of Big Tree "entirely freed" them from the effects of all existing Indian treaties so that the Tuscaroras had no right of free use and enjoyment of the former Seneca lands. *See Federal Power Commission*, 362 U.S. at 123 n.18. These cases, rather than *Mille Lacs*, control here.

Second, petitioner asserts that the New York Court of Appeals ignored several of this Court's canons of treaty construction. The construction given the Treaty of Canandaigua by the court below, however, follows directly from *Federal Power Commission*, and thus surely does not conflict with this Court's precedent. It also comports with the relevant canons. Petitioner primarily complains that in rejecting his claim to continued "free use and enjoyment" of

the former Seneca lands, the court below rendered article IV of the Treaty surplusage. Pet. at 17-18. But article IV does not create any Tuscarora rights beyond those that are arguably conferred by article III; it simply summarizes the consideration provided by the United States in articles II and III of the Treaty in exchange for the tribes' cession of all other Indian lands in article IV. *See* Treaty of November 11, 1794, 7 Stat. at 45.

Petitioner also argues that Indian treaties should never be construed to the tribes' detriment. *See* Pet. at 18-19. But that principle, of course, does not require a result favorable to tribes, regardless of a treaty's language. As this Court has held, "Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice." *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943). *See also South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986) ("The canon of construction regarding the resolution of ambiguities in favor of Indians . . . does not permit reliance on ambiguities that do not exist."); *Klamath Indian Tribe*, 473 U.S. at 774 ("courts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' . . . clearly runs counter to a tribe's later claims").

II. This Court's Recent Decision In *City of Sherrill v. Oneida Indian Nation* Provides An Alternate Ground For Affirmance.

Even if petitioner could identify some conflict between the decision below and the decisions of this Court or any federal or state appellate court, this case provides a poor vehicle for addressing petitioner's claims about the scope of the Treaty of Canandaigua. In its recent decision in *City of Sherrill v. Oneida Indian Nation*, 125 S. Ct. 1478 (2005),

this Court held that the Oneida Indian Nation could not unilaterally assert sovereignty over land reacquired in its former reservation. It relied on the Indians' extreme delay in asserting the claim, the longstanding exercise of state regulatory authority over the area, and the non-Indian character of the area's population. *See id.* at 1483; *see also Yankton Sioux Tribe v. United States*, 272 U.S. 351, 357 (1926) (impossible to rescind cession and restore lands to tribal members where lands were occupied by innumerable innocent purchasers); *Felix v. Patrick*, 145 U.S. 317, 334 (1892) (formerly wild land was developed by purchasers in reliance on the cession).

As the State of New York argued in the court below, these same considerations weigh strongly against construing the Treaty of Canandaigua to confer upon the Tuscaroras a continuing right of "free use and enjoyment" in the former Seneca lands.[5] Such a result would contradict the understanding that has prevailed for more than two centuries that the Treaty of Big Tree "extinguished all the Indian rights in the land referred to." *Massachusetts v. New York*, 271 U.S. 65, 95 (1926) (citing a resolution of the Massachusetts Legislature passed March 8, 1804); *see also New York ex rel. Kennedy v. Becker*, 241 U.S. 556, 561-62 (1916) ("[t]he lands — which were soon resold — thus passed by the [Big Tree] conveyance into private ownership and were subject to the jurisdiction and sovereignty of the State of New York"). The Tuscaroras have failed to press this claim

5. New York's brief in the Court of Appeals, submitted before this Court decided *Sherrill*, argued that the Tuscaroras' inordinate delay in asserting their treaty rights and the vast changes in the character of the region since 1797 barred petitioner's claim. *See* Brief of Respondent State of New York at 25-26, *People v. Patterson*, 5 N.Y.3d 91 (2005) (No. 91).

in the intervening 200 years, during which time the wilderness ceded by the Senecas in 1797 has been heavily developed by generations of owners in reliance on the understanding that any Indian claim to the region was extinguished during the administration of President John Adams. A judicial finding that Tuscarora rights to the former Seneca lands were not extinguished by the Treaty of Big Tree "would seriously disrupt the justifiable expectations of the people living in the area." *Hagen v. Utah*, 510 U.S. 399, 421 (1994).

Thus, even if this Court were to revisit the construction of the Treaty of Canandaigua set forth in *Federal Power Commission*, *Sherrill* provides alternate grounds for affirming the decision below. Accordingly, this Court should deny the petition for a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. _____

IN THE

Supreme Court of the United States

NEIL PATTERSON, JR.,

Petitioner,

v.

NEW YORK,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX F — NIAGARA COUNTY COURT DECISION AND ORDER

STATE OF NEW YORK
COUNTY OF NIAGARA

NIAGARA COUNTY COURT

PEOPLE OF THE STATE OF NEW YORK,

vs.

APPEAL TO COUNTY COURT FROM THE TOWN OF WILSON COURT Index No. 16086

NEIL PATTERSON, Jr.
Defendant.

DECISION and ORDER

SPERRAZZA, J.

The defendant/ appellant is a member of the Tuscarora Indian Nation, which is one of the Six Nations of the Iroquois Confederacy or Haudenosaunee. On February 9, 2003 the defendant was ice fishing in Wilson Tuscarora State Park where he was observed by

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Environmental Conservation Officer Richard Lang. Officer Lang noticed that the defendant did not have an identifying tag on his ice fishing rig, or tip-up. The lack of an identifying tag on a tip-up is a violation of 6 N.Y.C.R.R. § 10.4-7. Officer Lang issued a citation, returnable in the Wilson Town Court. The defendant pled not guilty and requested a trial.

At the trial of the matter, Officer Lang, who prosecuted the case, testified as to his observations and the lack of an identifying tag on the defendant's tip-up.

The defendant responded that it was his belief that the State does not have jurisdiction over aboriginal territory and that State Conservation Law may be applied to Native Americans off their reservation only when the law's purpose is "preserving conservation of resource."

Officer Lang responded that when off the reservation, Native Americans must follow the rules enacted. He cited a memorandum of his department which states that Native Americans are to comply with all laws and regulations regarding seasons, bag limits and size limits. Lang further argued that the subject regulation has as its purpose the conservation of resource.

The defendant supplied to the court a case decision and two treatise citations, which are not contained in the court record, reportedly relating to the limits imposed upon the state's power to regulate Native American hunting and

fishing rights. The defendant stated that his actions were guaranteed by the "Treaty of Canandaigua in 1794" (hereafter "Treaty of 1794"). Lang responded that the regulation applies to all individuals within the state.

The court ruled that the defendant had violated the statute and fined him $25.00 The defendant has appealed the judgment of the lower court.

In his Affidavit of Errors filed pursuant to Criminal Procedure Law § 460.10, the defendant cites two defects in the ruling of the court which are the subject of his appeal. First, the defendant argues that the court did not correctly apply the doctrine of "conservation necessity" which limits state enforcement of conservation regulations against Native Americans exercising treaty hunting and fishing rights. The defendant also contends that the guidelines put forth by the Department of Environmental Conservation, Division of Law Enforcement, which state that Native Americans must comply with "legally established seasons, bag limits and size limits", meant that it was the policy of the Department to not apply the regulation requiring an identifying tag on tip-ups to Native Americans.

In his brief on appeal, the defendant argues that he was exercising rights guaranteed by The Treaty of 1794 to fish at Wilson Tuscarora State Park. As such, any state regulation which limits his fishing rights would only be lawful, as applied to him, if the People could show that the

regulation itself was reasonable and necessary to conservation and that its application to Native Americans was also necessary for conservation. Further, the defendant agues that it is the People's burden to show the necessity of the regulation in question. The defendant cites a number of cases supporting this position (Tulee v. State of Washington, 668 U.S. 681; Puyallup Tribe v. Department of Game of Washington, 391 U.S. 392; United States v. Washington, 384 F. Supp 312, aff'd 520 F.2nd 676; Antoine v. Washington, 420 U.S. 194). The defendant contends that the failure of the court to apply this rule of law was a failure of constitutional dimensions in that it violated the Supremacy Clause of the United States Constitution.

Upon review of the cited cases, the Court agrees that the conservation necessity doctrine, if applicable in this case, would place upon the People at trial the burden of showing that the regulation passed the standard set by the Supreme Court. However, for this doctrine to be applicable in this case, the defendant, who was not on a reservation, must have been exercising rights guaranteed to him by treaty. The initial burden therefore is upon the defendant to establish that he is a Native American exercising rights established under a treaty.

In his brief, the defendant argues that the issue is one of subject matter jurisdiction. However, the Wilson Town Court does have jurisdiction to hear criminal cases regarding violations of the state environmental

conservation regulations against any person, including Native Americans. Rather, the issue raised by the defendant is in the nature of a defense under Penal Law § 35.05(1) in that the defendant is conceding that he did the act but is asserting that his conduct was authorized by law or a judicial decree, i.e. the law of conservation necessity.

The Court has framed this question in the context of a defense raised by the defendant pursuant to Penal Law § 35.05-1 and the Court is aware of the obligation placed upon the People by Penal Law § 25.00 to disprove a defense beyond a reasonable doubt. To establish a defense to which the People must respond, the defendant must at least present sufficient evidence from which it would be reasonable to conclude that the defense may apply. The defendant here has fallen short of that requirement.

The defendant stated at trial the he was exercising rights pursuant to the Treaty of 1794. However, according to the record on appeal, the defendant did not present the Treaty to the court, nor did he present any evidence that the area where he was fishing was included within the Treaty. This Court has examined the Treaty of 1794 and, without a map or some historical context not contained in the trial record, could not make a determination from the face of the Treaty that the Wilson Tuscarora State Park was land within the area delineated by the Treaty. For example, the Treaty of 1794 gives the property description for the relevant land in Article III as "*The land of the*

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Seneca nation is bounded as follows: beginning on Lake Ontario, at the northwest corner of the land they sold to Oliver Phelps, the land runs westerly along the lake, as far as O-yon-won-yeh Creek, at Johnson's landing place . . . ." It is certainly not apparent to the Court, from this description, that this land includes present day Wilson Tuscarora State Park.

The defendant argues that his treaty fishing rights arise from the language in Article III as follows: "*Now the United States acknowledge all the land within the aforementioned boundaries to be the property of the Seneca nation; and the United States will never claim the same, nor disturb the Seneca Nation, nor any of the Six Nations, or of their Indian friends residing thereon and united with them, in the free use and enjoyment thereof; but it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.*"

The defendant claims rights under this Treaty but his tribe is not mentioned by name and again, it takes some historical knowledge, outside of the proof presented by the defendant, to recognize that the Tuscarora Tribe was one of the Six Nations of the Iroquois and that the land in question is that mentioned in Article III of the Treaty of 1794.

The area where he was fishing is obviously no longer tribal land so there must have been some

intervening transaction which caused this land to be the public property of the State of New York. The defendant presented no proof to the court as to the nature of that transaction or that the right to "free use and enjoyment" of the land survived the transaction.

The defendant presented no proof that his tribe resided in the area at the time of the execution of the treaty or that it was their custom and practice at the time to fish in the area that is presently Wilson Tuscarora State Park. He presented no evidence that his tribe had aboriginal history or rights in the area.

Were the defendant's statements made in this trial deemed sufficient to raise the defense that his otherwise unlawful actions were authorized by law or judicial decree, then any person charged with a violation of such a regulation could appear in court, claim membership in a tribe, announce the existence of a treaty which purportedly granted him rights, and thereby place a burden of proof upon the People. Based upon the unsupported claim of the defendant, the People would have to prove, beyond a reasonable doubt, that the defendant was not a member of the tribe, or that the treaty did not grant the rights claimed, or that the tribe had not historically fished at that location, or that the treaty did not apply to the land in question. The unfairness of such a position is obvious, for which reason the Court finds it proper that the defendant raising such a defense present reasonable evidence in support of his position.

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On the record below, the Court does not find that the defendant put forward sufficient proof from which it could be reasonably concluded that he was exercising rights guaranteed to his tribe under a treaty. Therefore, the defense was not established and the State was not placed under the burden of proving that the regulation was necessary for conservation purposes.

This Court would reach a different conclusion if there was legal precedent dealing with the Tuscarora Tribe which established the existence of their treaty fishing rights at the location under the Treaty of 1794, or some other treaty. Then, it would be sufficient for the defendant to appear in court and cite his status as a Tuscarora. However, the burden was on the defendant, in this case of first impression, to present some proof of the existence of such rights.

Upon this line of reasoning, the Court finds that the defendant, who admitted the act in question and did not raise a viable defen..., was properly convicted of the offense charged.

Were this Court to find that the defendant had sufficiently raised the defense, we would nonetheless find that the People had disputed it by the contention of the conservation officer that the regulation applies to the defendant off the reservation. Then the question before the trial court would have been- Did the defendant have usufructory fishing rights pursuant to the Treaty of 1794?

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It appears that the lower court answered this question in the negative. In the court's return, in response to the Affidavit of Errors, the court stated that the conservation necessity doctrine raised issues which the court felt were not applicable to the case and that the defendant must comply with the charged regulation, as well as other rules and regulations, while off reservation land.

This Court finds that the lower court's ruling was correct as a matter of law. In reaching this determination, the Court has examined several cases which have dealt with the Treaty of 1794 and its background. Some of these cases set out an extensive exposition, based upon the factual records made before those courts, of the history of the Native American population of Western New York from earliest times up to and beyond the time of the Treaty (see, Seneca Nation of Indians v. State of New York, et al, 206 F. Supp. 2nd 408; People ex rel. Kennedy v. Becker, 215 N.Y. 2d 881, aff'd 36 S. Ct. 705; Tuscarora Nation of Indians v. Power Authority of the State of New York, 164 F. Supp. 107; Federal Power Commission v. Tuscarora Indian Nation,326 U.S. 99, 80 S.Ct. 543, 4 L. Ed 2nd 584).

The Court finds that it must follow the reasoning and ruling of the Supreme Court in Federal Power Commission v. Tuscarora Indian Nation, *supra*. The Court noted there that the Tuscarora were recent inhabitants of the area at the time of the treaty, having moved from North Carolina within the previous fifty

years. They had no aboriginal interest in the area but were tenants at sufferance of the Seneca. The Court interpreted the Treaty as recognizing that the Seneca alone had title to the Western New York area and that the land was sold by the Seneca to Robert Morris pursuant to the Treaty of Big Tree of 1797. The Court stated that, by the terms of this Treaty and sale, the "lands were entirely freed from the effects of all then existing treaties with the Indians . . ." (326 U. S. at p. 121, n. 18). The Court in that case was not dealing with Wilson Tuscarora State Park but with nearby lands actually owned and held in fee by the Tuscarora, which the government wished to take for a power project. The Court held that the lands in question are not subject to any treaty between the United States and the Tuscarora (at p. 123). From this ruling, it naturally flows that the land which is now Wilson Tuscarora State Park would also be held free from any treaty with the Tuscarora. In Tuscarora Nation Indians v. Power Authority of the State of New York, 164 F. Supp. 107, the District Court stated that "the original right of Indian occupancy and the pre-emptive rights in the lands now occupied by the plaintiff were actually extinguished by the Treaty of 'Big Tree.'" (at p. 112).

The Court is aware that the rule of treaty construction is that any ambiguities should be resolved in favor of the Native Americans and that the treaty should be interpreted in the way in which it would have been understood by the signatories at the time (Oregon Dept. of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753,

766, 105 S.Ct. 3420, 3428, 87 L.Ed.2d 542 (1985); People ex rel. Kennedy v. Becker, 241 U.S. 556, 36 S. Ct. 705, 60 L. Ed. 1166). This rule developed so that the "more sophisticated" party would not take advantage of the Native Americans in their dealings. In this case, some of the historical reading indicates that the Indians, led by Red Jacket, may have been the shrewder, more persistent bargainers (Seneca Nation of Indians v. New York State, 206 F. Supp. 2d 408 at 483, et seq.).

It appears to this Court, in light of the historical context, that the language of the Treaty of 1794 is clear and unambiguous. The purpose of Article III of the treaty of 1794 was to deal with the Seneca Nation and to secure to that Nation their property rights in the area of Western New York, in return for peace (see generally, Seneca Nation of Indians v. State of New York, 206 F. Supp. 2d 408 at 483, et seq.). The relevant portion of the Treaty of 1794 is: "*Now the United States acknowledge all the land within the aforementioned boundaries to be the property of the Seneca nation; and the United States will never claim the same, nor disturb the Seneca Nation, nor any of the Six Nations, or of their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.*"

The clear language of the treaty, read as a contract or agreement between the parties, was that the Seneca and